Bisley v Proprietors of Wakatu

High Court Nelson
7 November 1984, 29 April 1985
Ongley J

Arbitration – Lease originally of Maori reserved land – Leasehold interests later transferred – Rent review under original lease referred to arbitration – No hearing before award published – Whether misconduct by arbitrators – Significance of Maori Reserved Land Act 1955

Land vested in a Maori Incorporation was leased for 21 years and renewed subject to the same terms except as to rental. After the first renewal the land was subdivided by the then lessee and although the leasehold interests were transferred, there was no surrender of the existing lease and no separate leases were granted for the new lots. When the lease expired in 1981, the leasehold interest in one of the subdivided lots was transferred to the applicant. The original lease provided for the valuation of the buildings and improvements and of the fair groundrent for the renewed term in detail and made provision for reference to arbitration.

The award was made without further reference to the applicant who lodged an objection to the amount determined, asking that the award be set aside on the grounds of misconduct and upon the ground that the applicant was entitled to a prescribed lease under s 28 of the Maori Reserved Land Act 1955.

Held, 1 The applicant was not entitled to a grant of a prescribed lease under the Maori Reserved Land Act 1955. Section 28 did not legislate for incorporation of a term in the lease itself, but imposed statutory conditions upon leases of reserve land. At the time of the expiry of the term of the original lease, the demised land was no longer Maori reserve. Further, that Act was not passed in substitution for the Acts mentioned in the lease, but was new and different legislation and the provision of the lease referring to those earlier Acts did not otherwise make the 1955 Act applicable.

2 The award was set aside. Arbitrators are required to act judicially and cannot ignore the right of a party to a reference to be heard. Where arbitrators choose to make an award without consulting the wishes of the parties in this respect when there is no agreement between the parties and no established custom or usage that they should not be heard, such an award is open to challenge upon the ground of misconduct of the proceedings.

Cases mentioned
re Eskay Metalware Ltd [1978] NZLR 46
Hamill v Wellington Diocesan Board of Trustees [[1927] GLR 197
Horowhenua County Council v Nodine (1907) 9 GLR 197
Maori Trustee v Bary [1965] NZLR 1103
Mediterranean and Eastern Export Co Ltd v Fortress Fabrics Manchester Ltd [1948] 2 All ER 186
Myron v Tradox Export [1969] 2 All ER 1263
Wilson v Glover [1969] NZLR 365

Ongley J: Two applications under ss 11 and 12 of the Arbitration Act 1908 are by consent being heard together. The applicants are different persons in each case but the matters in issue are identical and relate to two blocks of land being part of a larger area within the Westland and Nelson Maori Reserves. The land concerned is vested in the respondent, a Maori Incorporation, constituted under the Wakatu Incorporation Order 1977 (SR 1977/197) pursuant to s 15A of the Maori Reserved Land Act 1955.

The applicants in each case are the holders of leasehold interests in those lands. The matters in dispute arise out of a submission to arbitration pursuant to a clause in the relevant memorandum of lease in each case making provision in that behalf for the determination of the rental payable on renewal of the term of the lease.

It is necessary for a proper understanding of the issues to have regard to the historical background of the ownership of the land and the creation of the leasehold interests.

The land of which these two blocks were part was originally Native reserve within the definition of that term contained in the Native Reserves Act 1882. By reason of being situate in the Nelson district it became subject in the year 1887 to the Westland and Nelson Native Reserves Act of that year, an Act which provided for the management of Native reserves in those districts. Not long after its incorporation the respondent acquired the freehold of a large block of Maori Reserve land in the Nelson area much of which was subject to leases for 21 year terms with perpetual rights of renewal. Part of that land was a parcel of 103 acres 2 roods 38 perches subject to Memorandum of Lease No 2504 originally granted for a term of 21 years from 1 July 1939 and renewed for a further term of 21 years from and including 1 July 1960 upon the same terms except as to rental. In 1962 that area was subdivided by the then lessee into six lots and although the leasehold interests in the several lots were subsequently transferred to other owners there was no surrender of the existing Lease and no separate leases were granted for the new lots. When the lease expired on 1 July 1981 the leasehold interest in one of these subdivided lots, Lot 6, 20.9364 ha in area, had been transferred to the abovenamed Graham Frederick Bisley and his wife jointly with a Mr and Mrs Palmer; and another smaller lot, Lot I, 4.1530 ha in area, had been transferred to the abovenamed William Mark Linton Wheeler. It was the intention of the Bisleys and the Palmers to subdivide their leasehold into two roughly equal areas and that has since been carried out.

Clause 9 of lease No 2504 provided for a valuation of buildings and improvements on the demised land and of the fair groundrent for the renewed term to be made as follows:

> "9. That not more than twelve months nor less than six months before the expiration by effluxion of time of the term hereby granted a valuation shall be made of all buildings and improvements then standing and being upon the demised premises in situ and not for removal and another valuation shall at the same time be made of what would be the fair annual value or groundrent to be paid in even portions half-yearly for the said parcel of land without any buildings or improvements such valuation to be made by two valuators one to be appointed by the Lessor and one by the Lessee for the time then being but in the event of the Lessee failing to appoint a valuator within two weeks of his being requested by the Lessor in writing so to do such written request being served upon the Lessee personally or left or posted by registered letter to his usual or last-known place of business or abode in New Zealand then the Lessor shall appoint the valuator in lieu of the appointment the Lessee shall have failed to make. In the event of such valuators not being able to agree within one month after the notification of the appointment of the second of such valuators to the other they shall appoint an umpire whose decision shall be final and conclusive and so that any valuation shall be made within one month of the reference to the valuators being complete or within two months of such reference as aforesaid by their umpire if they fail to agree. The valuators in making their valuation shall decide in what proportion the fees to be paid to the valuators shall be paid by the Lessor or Lessee."

By letter dated 15 June 1981 the applicant, Wheeler, notified the respondent of his election to accept a renewal of his existing lease and of the appointment of Mr M J Leggatt as his arbitrator for the purpose of determining the rental for the renewed term of his lease. The Bisleys notified the respondent of their election to accept a renewal of their existing lease and of the nomination of Mr Gair Thompson as their arbitrator for the same purpose. In both cases the respondent appointed the District Valuer of the Valuation Department at Nelson as its arbitrator.

Both the Bisleys and Wheeler in notifying the respondent as aforesaid. incorporated in the standard form supplied to them by the respondent a handwritten request for a prescribed lease."

In Wheeler's case the arbitrator's award was published on 29 June 1981 determining the rental of his land at $4,540 without specifying the rental period. There was considerably more delay in completion of the award relating to the Bisley's rental which was eventually published on 19 February 1982 determining the rental of their land for the renewed term as $10,939, also omitting to state the rental period. I have no doubt that in each case the amount was intended to be an annual rental.

Both applicants promptly made known to the respondent their objection to the amount of the rental determined by the arbitrators in each case but proceeded to execute leases upon that basis without prejudice to their rights to challenge the validity of the respective awards as they are now doing. The respondent raises no opposition to that course and wishes to have the validity of the arbitration determined in these proceedings.

The applicants ask that the award be set aside or remitted to the arbitrators upon the ground that they are entitled to a prescribed lease under Section 28(2) of the Maori Reserved Land Act 1955 and upon the further ground that the arbitrators misconducted the arbitration proceedings in various ways.

I shall deal with the question of the prescribed lease first because it is clear that if the applicants have effectively exercised an option open to them under s 28(2) by requesting a prescribed lease then the arbitration has been conducted upon a wrong basis and must be set aside on that ground alone whatever other misconduct there may have been in the proceedings.

Section 28(2) of the Maori Reserved Land Act 1955 reads as follows:

> "(2) Notwithstanding the terms relating to the renewal of any subsisting lease of any Maori reserve or township land which is renewable in perpetuity, the lessee may require the Maori Trustee to grant to him, instead of a renewed term of his lease, a prescribed lease, and the Maori Trustee shall, subject to the provisions of subsections (3) and (4) of this section, grant to the lessee a prescribed lease accordingly."

A "prescribed lease" by definition means a lease in either of the two forms of lease prescribed in the Second Schedule to the Act.

At the time of expiry of the term of lease 2504 in 1981 however the demised land was no longer Maori reserve by or pursuant to the Maori Reserved Land Act 1955. Section 15A of that Act, inserted therein by s 11 of the Maori Purposes Act 1975, provided for the incorporation of Maori owners by Order in Council and for the entitlement by an incorporation so constituted to have the fee simple of the land specified in the Order in Council transferred to it by the Maori Trustee. All land so transferred and all land subsequently vested in the incorporation. Whatever its status immediately before the transfer, becomes in the hands of the incorporation freehold land as if a declaration to that effect had been made by the Maori Land Court under s 31(3) of the Maori Affairs Amendment Act 1967. By virtue of s 15A(9) the provisions of s 14(4) of the same Act apply to any current leases over land transferred to a Maori incorporation pursuant to s 15A.

The primary purpose of s 14 is to authorise the making by the Maori Land Court of orders vesting reserved land no longer required to be administered by the Maori Trustee in the beneficial owners thereof. s 14(4) which was added by s 10 of the Maori Purposes Act 1975 reads as follows:

> "(4) The rights, duties, and obligations of the Maori Trustee under any leases granted or administered by him pursuant to this Act shall, upon the vesting by an order under this section of the land comprised in any such lease, be exercisable by and enforceable against the legal owner or owners for the time being of the land, and all the provisions of the lease and any provisions of this Act incorporated in the lease, either directly or by reference, and relating to the service of notices and the making of applications and the like, upon, to, or by the Maori Trustee shall be read accordingly."

There is no dispute that the Wheeler land was transferred to the incorporation under s 15A and the Bisley land was later vested in it under s 11(6)(b) of the Maori Purposes Act 1978. It is clear therefore that s 14(4) applies to Lease 2504, s 15A(1) also makes s 31(2) of the Maori Affairs Amendment Act

1967 applicable to the land so that "the estate of the incorporation shall be subject to all leases, mortgages, charges and other interest to which the title of the owners or any of them was subject at the date of incorporation." The Bisley land is also affected by s 11(2) and (4) of the Maori Purposes Act 1978 but none of those other provisions add anything to the effect of s 14(4) so far as the present issues are concerned.

The applicants submit that irrespective of the terms of their leases s 14(4) of the Maori Reserved Land Act 1955 makes s 28(2) of that Act applicable to those leases. Section 28 is an overriding provision affecting all subsisting leases of Maori reserved land and unarguably affected the land which is the subject of these applications before it was transferred to or vested in the respondent incorporation. It is to be noted however that it does not legislate for incorporation of a term or terms in the lease itself; it imposes statutory conditions upon leases of reserve land. It can have no effect upon a lease of freehold land unless that is brought about by some other statutory provision. Section 14(4) does not, in my view, achieve this result. The subsection is framed in two distinct parts, the first, extending down to and including the words "enforceable against the legal owner or owners for the time being of the land", has relation to the "rights duties and obligations of the Maori Trustee" under any lease so as to make them exercisable by and enforceable against the legal owner of land which has become freehold land under s 14 or 15A. It cannot be said that the rights given to a lessee by s 28(2) are *rights . . . under any lease.* Those underlined words to my mind connote rights which derive from the terms of the lease itself, not rights which are acquired by statutory imposition. Rights acquired by virtue of the demised land becoming subject to the Act pursuant to s 3(1) did not survive the change of status of the land from reserve to freehold. The second part of the subsection is expressed disjunctively and relates only to provisions of the lease and provisions of the Act incorporated in the lease and is further limited in its application to provisions related to the service of notices, the making of applications and the like. It has no application to the provisions for rental, fixing of rentals and substantive matters of that kind.

The alternative proposition is that a right to the grant of a prescribed lease exists by virtue of clause 12 of the lease. Clause 12 is in these words:

> "12. *That* this lease shall be subject to the provisions of the Native Reserves Act 1882 the Westland and Nelson Native Reserves Act 1887 or any amendment of those Acts or any Acts passed in substitution thereof and of any Act authorising or regulating the granting of leases of land under the Westland and Nelson Native Reserves Act 1887."

Both the Native Reserves Act 1882 and the Westland and Nelson Native Reserves Act 1887 were repealed by the Maori Reserved Land Act 1955 without any savings clause which would preserve the effect of those Acts in relation to subsisting leases. The applicants' contention is that the Maori Reserved Land Act 1955 is an Act "passed in substitution" for either or both of the Acts mentioned in Clause 12. As to what is an Act in substitution for another Act, in *Re Eskay Metalware Ltd (In liquidation)* [1978] NZLR 46, 49 Richardson J in delivering the judgment of the Court of Appeal said this:

> "Section 21 is a broadly expressed provision. The criterion to be applied is whether the subsequent enactment was passed "in substitution for" the repealed provision. In its terms it is wider than the corresponding provisions of the Interpretation Act 1889 (UK), s 38 (1), and the Acts Interpretation Act 1901-1973 (Australia), s 10, referring to "re-enactment" with or without "modification". Nevertheless, it cannot extend to a new provision that is essentially different in kind. To be "in substitution for" means to be put in the place or stand in the stead of the repealed provision. It follows that the new enactment must be of the same character as its predecessor; it must have the same kind of function and the subject-matter must be essentially the same without necessarily being identical in its scope. But, provided the new provision is directed to the same end, there need not be precise correspondence in the manner of dealing with the subject matter. That is implicit, too, in s 21 (2) under which all the provisions of the subsequent enactment are deemed to have been applied, incorporated, or referred to in the unrepealed Act, without

reference to those that were present in the repealed provision. It is not necessary to attempt an exhaustive statement of the considerations that will be material in every case. The process of evaluation and comparison of the two provisions will ultimately lead to a judgment as to whether, in the particular case, the later provision is in substitution for the repealed section, or amounts to a new and different provision."

The Court of Appeal was there construing a single statutory provision enacted in substitution for an earlier provision. In the terms of clause 12 of lease 2504 I apprehend that no part of the Maori Reserved Land Act 1955 would be applicable to the lease unless it can be said that the Act, and that I take to mean the whole of the Act, was passed in substitution for either of the two earlier Acts. It is necessary therefore to evaluate and compare the respective provisions of the three Acts concerned.

The Native Reserves Act 1882 was enacted to consolidate the administration of Native reserves and in so doing repealed a number of earlier Acts bearing on the same subject matter. Sections 1 and 2 are devoted to the short title and definitions respectively: s 3 defines what lands shall be deemed to be Native reserves; ss 4 and 5 deal with particular territories and ss 6 and 7 with the jurisdiction and procedure of the Maori Land Court. The second group of sections, being ss 8 to 18 inclusive, provide for the administration of the Native reserves by the Public Trustee and the vesting of the land in him. Except for the power to lease contained in s 15 the other sections are largely administrative machinery provisions. The third group of sections, ss 19 to 26, provide for the bringing of land under the Act by application to the Maori Land Court and deal with Court procedures in relation to applications for appropriate orders. The final group, ss 27 to 32 inclusive, deal with miscellaneous matters.

The Westland and Nelson Native Reserves Act 1887 was enacted to provide for the management of Native reserves in those areas. The reserves subject to the Act continued to be subject as well to the Native Reserves Act 1882. One of the main purposes of the Act appears to have been to provide for a uniform term for 21 years for all leases of reserve land in the territories affected instead of the maximum terms of 30 years and 63 years provided for in s 15 of the Native Reserves Act 1882 and for the inclusion in all new leases of a condition giving lessees a right of renewal in perpetuity at rentals to be ascertained at the time of renewal. The rest of the Act is concerned with the sale of new leases after the expiry of subsisting leases, matters of valuation, compensation for improvements and so on. It seems to me that in large part the effect of the enactment would have been spent by the time the Maori Reserved Land Act 1955 was passed. Before that time there was a great deal of other legislation affecting Maori Reserve land much of which was also repealed by the 1955 Act, which was a piece of legislation of much wider scope than any of the repealed Acts. It consisted of 93 sections and was divided into six parts. Section 3(1) provided that all lands which immediately before the commencement of the Act were subject to the Maori Reserves Act 1882 or the Westland and Nelson Maori Reserves Act 1887 should become Maori reserves subject to the 1955 Act. The preamble to the Act is as follows:

"An Act to consolidate and amend the law relating to the administration of the lands comprised in Maori reserves. West Coast Settlement reserves, and Maori townships, and to make provision in respect of certain other lands administered by the Maori Trustee."

The several parts of the Act are set out under these headings:

Part I – Sections 3-15A
General Provisions Applicable to Reserved Land

Part II – Sections 16-25
Succession to and Disposal of Beneficial Interests in Reserved Land.

Part III	–	Sections 26-57 Provisions With Respect to Leases of Maori Reserves and Township Land
	–	subheading Jurisdiction of Land Valuation Tribunal
Part IV	–	Sections 58-76 Provisions With Respect to Leases of Settlement Reserves
Part V	–	Sections 77-84 General Provisions With Respect to Leases of Reserved Land
Part VI	–	Sections 85-93 General

Applying the criteria adopted by Richardson J in the *Eskay Metalwork* case and having regard particularly to the extensive provisions of the 1955 Act affecting leases of Maori reserves I conclude that it is not an Act passed in substitution for the two earlier Acts referred to in clause 12 of the Lease but is new and different legislation. Even if Part III only is regarded as the relevant part of the Act for the purpose of making the comparison it is seen to be almost wholly new legislation related in the main to the institution of prescribed leases in substitution for subsisting leases, the fixing of rentals and methods of valuation in relation to the new type of lease. These provisions have no counterpart in any earlier legislation and bear no similarity in concept to the provisions relating to leases in the repealed Acts.

I conclude therefore that the applicants' submission must be rejected on both approaches and that they are not entitled to the grant of a prescribed lease under s 28(2).

I pass now to the applicants' submission that the arbitrators misconducted the proceedings. It is not contested that the provisions of clause 12 of the lease No 2504 constituted a submission to arbitration within the meaning of the Arbitration Act 1908. A similar reference was so treated by Barrowclough CJ in *Maori Trustee v Bary* [1965] NZLR 1103 and could hardly be regarded otherwise in light of the definition of "submission" contained in the Arbitration Act. Although the applicants raise a number of matters which they contend amount to misconduct of the proceedings the argument before me was devoted principally to the allegation that the arbitrators failed to give the parties any opportunity to be heard or of calling witnesses in support of their respective cases. The respondent is content with the arbitration in the form that it took and neither expected or wished to be heard or lead evidence. The applicants rely upon two cases in support of their view, *Hamill v Wellington Diocesan Board of Trustees* [1927] GLR 197 and *Horowhenua County Council v Nodine* (1907) 9 GLR 527. *Nodine's* case was concerned with an alleged agreement between the parties not to call evidence and deals with the question of where the onus lay of establishing such an agreement. It does not appear to have much bearing on the issues in this case but *Hamill's* case on the other hand I take to be directly in point. There the rent of certain land under a lease for a term of 42 years was to be fixed for the second 21 year period by a valuation made by two valuers, one appointed by the lessor and one by the lessee, or by their umpire should they fail to agree. The relevant clause in the deed of lease was held to be a submission to arbitration and the umpire's award was challenged upon various grounds pertaining to conduct of the proceedings including that

(1) no evidence was taken by the valuers or umpire;

(2) no opportunity was given to the parties to present their views on the basis upon which the rent should be assessed. The respondent Board contended that there was a waiver of the right to be heard and call evidence and that there had been no misconduct because the Arbitration Act 1908 did not require arbitrators to hear the parties or to take evidence. It was held that there had been no waiver and on the second point Reed J said this:

"it is true that s 8 of the Arbitration Act in its wording is permissive and not mandatory, but the section only purports to give power to the arbitrators or umpire to do certain things which will assist them to fulfil to the fullest extent their duty to hear and decide judicially. The Act does not purport to be a complete code of procedure for arbitrators or umpires. Before there was an Arbitration Act, arbitrations were generally conducted in pursuance of carefully-drawn submissions, in which, as a rule, the powers and duties of the arbitrators or umpire were carefully defined, but, even in such circumstances, the Court was not confined to ascertaining whether the arbitrators or umpire had complied with the duties so specified. They were required to act judicially:"

"Arbitrators, like other Judges," said Turner, J, in *Haigh v Haigh* (5 LT 507, at 509), "are bound, when they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice; and this Court, when called upon to review their proceedings, is bound to see that those rules have been observed.

The law in this respect has not been altered by the Arbitration Act – arbitrators must act judicially. In my opinion, an arbitrator, before making an award, must give the parties an opportunity of being heard and of calling any witnesses they desire in support of their claim."

Mr Allan submits that *Hamill's* case can be distinguished on its facts; in particular the fact that there was in that case a single umpire whereas here there are two valuers. I am unable to discern any distinction in that or any other respect The valuers are acting as arbitrators in the circumstances of this case and I believe that the remarks of Reed J are equally applicable to two arbitrators acting under the Arbitration Act 1908 as to a single arbitrator or an umpire. It may well be that in many cases the lessees of Maori leaseholds are content to leave the valuation and assessment of rental to their appointee without making representations or requesting the arbitrators to hear evidence, but I do not think arbitrators who are required to act judicially can ignore the right of a party to the reference to be heard. Where, as here, arbitrators choose to make an award without consulting the wishes of the parties in this respect when there is no agreement between the parties and no established custom or usage that they should not be heard, such an award is open to challenge upon the ground of misconduct of the proceedings.

The cases cited by Mr Allan do not lead to any different conclusion. He relied upon *Myron v Tradox Export* [1969] 2 All ER 1263, *Mediterranean and Eastern Export Co Ltd v Fortress Fabrics Manchester Ltd* [1948] 2 All ER 186 and *Wilson v Glover* [1969] NZLR 365. The first of the English cases turns upon the special character of the arbitration, the conduct of which was sought to be impeached; the second case and the New Zealand case in which the English decision was applied dealt with situations where a single arbitrator was chosen by the parties because of his knowledge and experience of the trade concerned and they intended to accept his judgment relying upon him to form it unassisted by the evidence of others. That is a very different situation from that which pertains when two registered valuers are appointed as arbitrators to determine the ground rent of a piece of land. In such a case the proper conduct of the proceedings requires at least that the wishes of the parties as to whether they should be heard are to be consulted.

Because of the view I take of this primary point I do not intend to make any findings upon the other complaints made by the applicants as to the conduct of the proceedings. I merely record that they concerned the failure of the arbitrators to appoint an umpire or to make an order as to costs and as well various criticisms of the form of the award.

I order that the award in each case be set aside upon the ground of misconduct of the proceedings in failing to give the parties the opportunity to be heard.

Each applicant is allowed the sum of $250 costs plus disbursements to be fixed by the Registrar.